No. 80-5

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN MCCARTY,
Appellant,

vs.

PATRICIA ANN MCCARTY,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Four

APPELLEE'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether Congress, by enacting statutory provisons creating and governing military retired pay, has mandated a pre-emption of State community property law such that California is precluded from treating Army retired pay as an asset subject to disposition by the court on dissolution of marriage.

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On Appeal from the Court of Appeal of California
First Appellate District, Division Four

APPELLEE'S BRIEF ON THE MERITS

Appellee (hereinafter "Wife") requests this court to affirm the decision of the California Court of Appeals awarding her an interest in Appellant's (hereinafter "Husband") military retired pay in accordance with established California community property law.[1]

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[1]Although Husband states Wife's interest to be 43%, in fact, Wife's interest is computed at 110/243, or 45.3%, following the "time-rule" formula approved by the Opinion Below. See discussion infra, at Footnote 10 and accompanying text.

OPINIONS BELOW

The opinion of the Court of Appeal is unreported (J.S., App.A, p. 32).

The opinion of the trial court is set forth in the Interlocutory Judgment of Dissolution of Marriage (J.S., App.B, Document 3, p. 77), which is also unreported.[2]

The California Supreme Court denied Husband's Petition for Hearing without opinion. (J.S., App.C, p. 83).

JURISDICTION

Husband invokes this Court's jurisdiction under *28 U.S.C., § 1257*. In order for jurisdiction to lie under that section, the State Court decision to be reviewed must have "drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, Treaties or laws of the United States."

Although, Husband did raise variously phrased claims of Federal pre-emption, in the proceedings below, at no point in the proceedings below did Husband ever draw in question the validity of the California Statute regarding quasi-community property (*California Civil Code § 4803*). Similarly, at no point in the proceedings below has Husband claimed that application of said quasi-community property statute to him rendered that statute void. Rather, to the extent that Husband asserted any Federal claims whatsoever during the proceedings below, he has asserted

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[2]Husband's reference to the Memorandum of Intended Decision as an opinion below is inexplicable inasmuch as such Memorandum is not an order nor an opinion of the court below. The order of the trial court is contained entirely in the Interlocutory Judgment of Dissolution of Marriage.

only that application of *California Civil Code* § *4803* to him, and specifically to his military pension rights, imparied rights granted to him by Federal Statute.[3]

The California Court of Appeal in the present case was never asked to—and did not—address the issue of the validity or invalidity of a State Statute. Although Husband employed different wording to advance his claim at different levels in the proceedings below, the claim itself was always the same: That his entitlement to Military Retired pay under Federal Statute could not be impaired by application to him of the State quasi-community prop-

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[3]Appellant's Trial Brief submitted by him to the Trial Court herein (filed May 20, 1977) raises no issue or claim whatsoever regarding validity or invalidity of a California statute. Said Trial Brief discusses only the issues of domicile (which are not subject of Appellant's appeal to this Court) and an assertion that Appellant's pension rights are nondivisible by the California Court because nonproprietary in nature.

Appellant's Post Trial Brief submitted to the Trial Court herein and filed May 20, 1977 again raises no claim or issue of invalidity of a state statute, and urges instead that "Petitioner's [Appellant herein] Federal pension 'rights' are neither 'vested' nor 'matured' within the meaning of *In re Marriage of Brown* (1976) 15 C.3d 838, and hence Petitioner has no property interest subject to division by this Court."

Appellant's Briefs to the California Court of Appeal below consistently asserted only that "California's Quasi-Community Property Scheme conflicts impermissibly with *right* granted the husband under Federal legislation governing Army retirement pay" (Appellant's Opening Brief, Page 10); and that Appellant's entitlement" to certain retirement pay may not be "diminished" by application of state law (Appellant's Opening Brief, Page 12).

Thus, although Appellant's contentions below have been inconsistent, the one consistency that does appear from all of his contentions is that he has never at any point in the proceedings below drawn in question the validity or invalidity of a California statute.

erty law. Thus, the Court below ruled upon Husband's assertion of, and claimed impairment of, Federally created rights. The decision of the Court below rests squarely and exclusively on the decision of the California Supreme Court in the case of *In re Marriage of Fithian* (1974) 10 C.3d 592, cert. denied 419 U.S. 825. *Fithian*, like the case at bar, deals solely with a claim of impairment of Federal rights and does not draw in question the validity or invalidity of a State statute on any grounds.

Appeal to this Court does not lie from a State Court's denial of an assertion of Federal rights or privileges. If a litigant argues that his Federal rights prevent application of a State statute to him, an adverse decision by the State Court amounts to a denial of the litigants assertion of Federal rights, rather than a validation of the State statute, and no review lies under *28 U.S.C. § 1257(2). Mergenthaler Linotype Co. v. Davis* (1919) 251 U.S. 256, 259. Thus, where a claim was made that there had been a systematic discrimination against the litigant in the application of a tax statute or ordinance, in violation of his right to Equal Protection of the laws, or where it has been asserted that a tax assessment infringed a taxpayer's Federal privileges and/or immunities, it has been held that no appeal will lie because such claims did not draw in question the *validity* of the subject statute. *Charleston Federal Savings and Loan Association v. Alderson* (1945), 324 U.S. 182, 185; *Rohr Aircraft Corporation v. San Diego County* (1960) 362 U.S. 628; *Wilson v. Cook* (1946) 327 U.S. 474, 482.

See also *Hanson v. Denckla* (1958) 357 U.S. 235, 244.

And,

> "The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis for a writ of error from the Court." *Jett Bros. Distilling Company v. Carrollton* 252 U.S. 1 at 6 (1920).

Husband's appeal herein does not lie, and should be dismissed.

CONSTITUTIONAL PROVISIONS/STATUTES INVOLVED

The following California statutes are involved herein, in addition to those listed in Husband's Brief:

California Civil Code § 4800(a)
California Civil Code § 4803

In addition, the following federal and California statutes (which were not set forth in full in the Appendix to Husband's Brief) are referred to in this Brief:

5 U.S.C. § 8346(a)
10 U.S.C. § 1402
10 U.S.C. § 3991
California Civil Code § 4603
California Civil Code § 4509
California Civil Code § 4801(a)
California Civil Code § 5110
California Civil Code § 5125
California Civil Code §§ 5152, 5156

The foregoing are set forth in the Appendix hereto.

STATEMENT OF THE CASE

This is a California action for dissolution of marriage commenced by Husband in 1976. (J.A.1)[4] In his petition to the Superior Court, Husband claimed that *all* property of the parties (even furniture) was his separate property and listed his military retirement benefits as an item of property to be confirmed to him. (J.A.2) Although Husband claimed that there was no community property because he was 'domiciled in Oregon', Husband also petitioned the court to determine the property rights of the parties "as provided by law". (J.A.2) Wife's response listed most of the parties' assets, including the military retirement benefits, as community property. (J.A.8)

Although child custody was presented as an issue in the original pleadings, that issue was resolved by stipulation *before* trial and was not presented to the trial court. (R.T. 4/12-14)[5]

The parties married March 23, 1957, while Husband was in medical school. (J.A. 32) July 1, 1958 Husband commenced active duty with the United States Army. When the parties finally separated October 31, 1976, they had been married 19 years and 7 months, of which 18 years and 5 months were while Husband was on active duty. As is not uncommon with military families, they had acquired very little property during their lengthy marriage: except for the military retirement, they had only two automobiles,

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[4]References to "J.A." are to the Joint Appendix, by page number.

[5]References to "R.T." are references to the Reporter's Transcript on Appeal from the Judgment of the Superior Court, and are to page/line of that Transcript.

furniture, and insignificant cash on deposit. (J.A. 42) As is also typical of military families, the parties and their children moved several times during their marriage. (J.A. 32) While such frequent moves may have been essential and helpful to Husband's career as an Army doctor, they are not conducive to the spouse's employment or career plans, if any. Wife was a housewife, unemployed at the time of trial (R.T. 37/7-8)

The trial court dismissed Husband's claim that he was an Oregon domicile (J.A. 43) after testimony that the parties left Oregon in 1959 and had not lived there since, (J.A. 63); that income tax returns were not filed in Oregon (J.A. 64); that Husband last voted in Oregon in 1968 (J.A. 65). The Court of Appeal affirmed the trial judge's weighing of the evidence, noting that "from the uncontroverted evidence noted above, that any finding regarding domicile would have been adverse to Husband."[6] The issue of Husband's domicile is not before this Court.

The trial court found that Husbands' military retirement benefits comprised an asset subject to disposition by the court, and, relying on *Civil Code §§ 4800 and 4803* ordered that:

> "(6) The [Husband] shall pay the [Wife] as long as she lives, that portion of his total monthly pension or retirement payment from the U.S. Army which equals one-half of the ratio of the total time between marriage and separation during which [Husband] was in the U.S. Army for the total number of years he has served with the Army at the time of retirement,

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[6]Opinion of the Court of Appeal, J.S., App. A., p. 32 at 56.

and the Court retains jurisdiction to make such a termination at that time and to supervise distribution."[7]

On appeal, the Court of Appeal affirmed the trial court's disposition of Husband's military retirement benefits, relying on *In re Marriage of Gorman* (1979) 90 C.A.3d 454, [153 Cal. Rptr. 479] and *In re Marriage of Fithian* (1974) 10 C.3d 592 cert. den. 419 U.S. 829.

SUMMARY OF ARGUMENT

The concept of federal pre-emption, derived from the Supremacy Clause of the United States Constitution, is central to the state-federal balance of powers upon which the United States system of Government is founded. Equally central to that system is the recognition that certain subject matters are traditionally reserved to the powers of the states as being peculiarly local in nature. Among these, is the entire area of domestic relation law, including marriage and the relations between husband and wife, including their property relations, both during marriage and upon its dissolution. Therefore, as essential as the concept of federal pre-emption itself, is the principle that said concept is to be sparingly invoked, in the interests of the preservation of state-federal balances of power.

Before a federal law will be found to have pre-empted a state law (especially in an area traditionally reserved to the states), it must be shown that an actual conflict exists between the two legislative schemes *and* that the applica-

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[7]Interlocutory Judgment of Dissolution of Marriage, J.S., App. B., Document 3, page 77 at 80.

tion of the state law would result in clear and major damage to federal objectives or interests. The test is two-pronged:

(1) Conflict in the terms of the legislative schemes, *and*

(2) As a result of such conflict, damage to the federal interests.

A showing of conflict is esential; and mere conflict, without an additional showing of damage to federal interests, is insufficient. Neither element exists in the question presented to this Court herein.

The conflict between state and federal laws in an area traditionally governed by the states must be derived from Congressional declarations of intent. Nothing in the federal statutory scheme governing the military retired pay indicates a Congressional intention to pre-empt state community property law.

If Congress had provided separately for spouses under the military retired pay plan, an inference might arise that it meant to pre-empt state law. Congress has made no such provision.

If Congress had clearly stated that military retired pay could not be reached by anyone other than the retiree under any circumstances whatsoever, that might serve as an inference of Congressional intent to pre-empt. Congress has made no such clear statement. Nothing in Congressional enactments or the legislative history surrounding Congressional enactments indicates that Congress has ever addressed and decided the issue of whether

military retired pay is subject to community property laws of the states. To the extent that the subject appears at all in legislative history, it is apparent that Congress has deferred consideration of the issue, and therefore, cannot be deemed to have declared its intentions.

Inasmuch as the conflict is missing, it cannot be argued that any damage to federal interests flows from such conflict. Even if a conflict were to be found in the application of state community property laws to military retired pay, such conflict, to the extent it exists at all, does no damage to federal interests. The overriding federal interest involved in the military retired pay system is that of attracting and maintaining a military force. Neither the building of such a military force, nor the maintenance of the morale of such military force is seriously threatened by allowing the members of such military force to undertake the obligations and duties of marriage as freely as civilians. It cannot seriously be argued that the morale of our military force requires that the spouses of said military force be stripped of the protections of domestic relations law, so that the expectation of a person marrying a military member is that he or she will become a second class citizen, deprived of the ordinary property rights and expectations of a person marrying a civilian. The spouses and families of members of the military force undergo significant sacrifices because of the nature of military career. To create an additional sacrifice demanded of such spouses, and thus possibly decrease marital stability of military members, will not greatly improve the morale of the members of the military.

ARGUMENT

I

Careful examination of both the State and Federal statutory schemes is required in order to evaluate Husband's pre-emption claim.

A

THE CALIFORNIA LAW

1. *In General.*

California is one of eight community property states at the present time.[8] Fundamental to the community property system is a premise that the husband and wife are equal partners in marriage, that each of them is deemed to make an equal contribution to the marital enterprise, and that each of them therefore shares equally in the fruits of that enterprise. Except for certain specified exceptions which are deemed separate property of one or the other spouse, all property acquired during the marriage is presumed to be community property, owned equally by husband and wife. *California Civil Code § 5110.* All property

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[8]Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Puerto Rico has a system of conjugal property which is similar to community property. However, it should be noted that although the case at bar addresses only the California system of community property, at the present time, several non-community property states also consider military retired pay to be divisible upon divorce or dissolution of marriage. *In re Marriage of Miller* (Mont.) 609 P.2d 1185 (1980); *In re Marriage of Musser* (Ill.) C.88 N.E.2d 1289 (1979); *Chisnell v. Chisnell* (Mich.) 267 N.W.2d 155, cert.den. 442 U.S. 940 (1979); *Kruger v. Kruger* (N.J.) 375 A.2d 659 (1977); *Bodenhorn v. Bodenhorn* (Canal Zone) 567 F.2d 629 (5th Cir. 1978).

or other acquisitions which are the result of the time, skill, and efforts of either spouse during the marriage belongs to the community, regardless of which spouse may have actually performed the labor or services from which the acquisition flows. Thus, the time, skill, and efforts of the husband belong to the community and any fruits therefrom belong to the community. Equally, the time, skill, and efforts of the wife belong also to the community, as do the fruits of those time, skill, and efforts. The presumption that property acquired during the marriage is community property is a rule of substantive law, not merely one of procedure or evidence. 439 U.S. 572 at 593. Further, the ownership interests of the spouses in the assets of the marital community are present, existing, and equal interests. *California Civil Code* § *5105*. It should be noted that California community property law is not merely a formula governing the division of property at the end of a marriage, but also one which governs the ownership and control of property during the course of the marriage, affecting both the spouses *inter se* and third parties dealing with the community or either of its members during the continuation of the marriage. *California Civil Code* § *5125*.

Upon dissolution of marriage (formerly divorce) in California, the division of property between husband and wife is governed by community property rules, and at the end of the marriage, each spouse has an equal and absolute right to receive his or her one-half interest in all of the property of the community without regard for the reasons for the breakdown of the marriage, or for the relative financial circumstances of the parties from their separate estates. *California Civil Code* § *4880* restricts the trial court

to making an *equal* division of all community property on dissolution of marriage.

In addition, upon dissolution of marriage (but not during the continuance of the marriage), the doctrine of quasi-community property is called into play. The California quasi-community property law is set forth in *Civil Code* § *4803* which provides,

> "As used in this part, [Family Law Act], 'quasi-community property' means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:
>
> (a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.
>
> (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition." (Emphasis added.)

Civil Code § *4800* includes all quasi-community property within its mandate of an equal division.

Thus, in dissolution of marriage in California, each party receives one-half of the community and quasi-community estate as his or her substantive property right, entirely independent from his or her right to seek support from the other party.

The award of spousal support in California is governed by *Civil Code* § *4801(a)* under the terms of which the trial court examines certain factors, including the parties'

relative financial circumstances (which was irrelevant to the divisions of community and quasi-community property), in order to make a determination whether either spouse is entitled to continuing support from the other.

California combines community property with the system of "no-fault" divorce or dissolution of marriage. Therefore, the California trial court does not and may not take into consideration any element of fault either in its division of community and quasi-community property, or in its determination of whether to award spousal support to either party (and, if support is awarded, its determination of the amount and duration of such support).[9]

2. *Retirement Benefits.*

California law governing treatment of pensions and/or retirement benefits on dissolution of marriage is set forth in

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[9]In Husband's Brief on the Merits, Footnote 76 is an unfortunate violation of the admonition to counsel to refrain from introducing irrelevant and scandalous material in Briefs to this Court. Rule 34(6) Rules of the Supreme Court of the United States. More importantly, Footnote 76, whether deliberate or inadvertent, is a gross misstatement of California law governing dissolution of marriage. California trial court hearing a marital dissolution may *not under any circumstances,* ever consider the causes behind the breakdown of the marriage either in dividing the marital property or in setting a level of support. Indeed, where, as in the present case, child custody is not at issue because it was resolved by stipulation (see Reporter's' Transcript on Appeal, 4/12-14), evidence of "specific acts of misconduct" by either party are inadmissible, *and* it is improper for the Court to receive such evidence or for counsel to attempt to introduce such evidence. *California Civil Code* § 4509. An attempt by husband to bring such matters before the trial court—such as his attempt to bring them before this Court—not only would have failed, but may well have subjected counsel to reprimand by that court.

case law rather than statutes. Husband misstates the California law on this subject in several important respects.

In 1974, the California Supreme Court held that once a military pension had vested, the State was not precluded from treating it as an item of community property for purposes of division of that property on dissolution of marriage. *In re marriage of Fithian,* 10 Cal.3d 592, 517 P.2d 449, cert. den. 419 U.S. 825. The vesting requirement included by the Court in *Fithian* reflected then California law governing both public and private pensions. However, in 1976, the California Supreme Court held that vesting was not a prerequisite and that nonvested pension and/or retirement rights also constituted property, to be treated as divisible assets upon dissolution of a marriage. *In re marriage of Brown,* 15 Cal.3d 838, 544 P.2d 561.

In *In re marriage of Milhan,* 27 Cal.3d 765 (July, 1980), the California Supreme Court has very recently affirmed that *Fithian,* as expanded by *Brown,* is the present California law governing treatment of military retired pay on dissolution of marriage.

Following *Fithian,* a California trial court treats military pensions the same as any other pension plan, whether public or private in source. The community has an interest in the employee/service member's plan interest, to the extent that it is attributable to employment/service during the marriage. The community interest is reduced to a percentage by the use of the so-called time rule: the ratio of the length of employment/service during marriage (defined as the period between the date of marriage and the date of separation) over the total length of employment/service

as of the date when the employee/service member begins to receive benefits.[10] It is central to the California community property treatment of retired pay that the community has only an interest in what the employee/service member has. The community and/or the nonemployed spouse do not acquire their own separate pension right or benefit; and, it follows, the interest or rights of the community cannot exceed or surpass the interests or rights of the member. Thus, the interest of the community is subject to disfeasance if the member's interest fails for any reason. For example, if a member receives nothing by way of retired pay because he dies (or chooses to leave the service before completing the required number of years of service) then the community has only a percentage interest in nothing.

It is not surprising that the list of "implications" set forth at Pages 31-35 of Husband's Brief is unsupported by any citation to California authority, inasmuch as each scenario drawn by Husband is in fact precluded by California law on the subject.

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[10]*In re Marriage of Anderson* (1976) 64 C.A.3d 36, 40. Consider a service member who commences service January 1, 1960 is married January 1, 1965, and separates permanently from his wife January 1, 1975. If the member retires on January 1, 1980, of his 20 years total service, 10 occurred during the marriage and the community has a 10/20 or 50% interest in the member's interest in the plan. If the member retired in 1983, the community would have a 10/23 or 43.4% interest. Compare a service member who completes his 20 years of service and retires prior to marriage. In that case, the community has no interest because none of the applicable years of employment/service occurred during the marriage relationship.

The trial court may award the nonservice spouse other community property which has a value as of the time of trial equal to the actuarially determined value of the community portion of the retirement benefit as of the time of trial.[11] Alternatively, as is perhaps more frequently done, the court may order that the non-member spouse receive his or her community interest in the retirement benefits *if, as,* and *when* benefits or payments under the plan shall be received by the service member. Thus, if the community has a 50% interest in the service member's plan rights, the nonservice spouse is awarded her one-half of that interest, or 25% of the benefits or payment, but only *if, as,* and *when* the service member himself actually receives that benefit. Therefore, if the service member chooses for reasons of his own to retire after 19 years, 11 months of service, the ex-spouse, like the service member, will receive nothing. If the service member chooses to continue in service beyond the 20 year mark, the ex-spouse must wait for her benefits until the service member actually retires and actually receives his benefits. Furthermore, although the ex-spouse has an interest in the service member's retirement interest,

> "It does not follow, however, that should the ex-wife die, her rights would descend to her heirs, and that the serviceman could thus become obligated to the ex-wife's future husband or subsequent children. In California it is clear that the heirs of the ex-wife are not entitled to the portion of retirement benefits the ex-wife would have received had she lived. (*Waite v. Waite* (1972),

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[11]The actuarial determination, of course, takes into account the probabilities of various forms of disfeasance of the pension before it is received, such as the service member's mortality rate.

> *supra*, 6 Cal.3d 461.) As stated in *Bensing v. Bensing* (1972), supra, 25 Cal.App.3d 889, 894 (hg.den.), 'the pension terminates with the death of the husband, and the wife's share also terminates if she predeceases husband.' " *In re marriage of Fithian*, 10 Cal.3d 592 at 601.

And, the service member remains free to make other elections with respect to his benefits:

> "Although insurance proceeds are community property to the extent the policy was purchased with community funds [citations], the principle does not extend to annuity plans created in the employment context. In *Benson v. City of Los Angeles* (1963), supra, 60 Cal.2d 355, we held that the rights of a widowed second wife take precedence over those of an ex-wife whose community funds were converted from husband's retirement plan to a related annuity contract. Characterizing the retirement benefits as community property, therefore, does not conflict with the serviceman's right to choose an eligible beneficiary under the annuity plans Congress established in coordination with the retirement system." Ibid.

3. *Quasi-Community Property/Domicile.*

Section 4803 does not, as Husband claims, invest the non-Army spouse with a new ownership right immediately upon relocation within the State.[12] A predecessor to § *4803*, which did have that result, was held unconstitutional by the California Supreme Court. *Estate of Thornton* (1934) 1 C.2d 1, [33 P.2d 1]. The *Thornton* Court stated that property ac-

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[12]The opinion below addressed this precise issue. J.S., App. A., 32 at 49.

quired elsewhere by a domiciliary of another state cannot, ". . . be converted into community property by the mere act of bringing it into a community property state . . ." 1 C.2d 1 at 4.[13]

As a result of *Thornton*, the predecessor to § *4803* was enacted to provide that its terms become applicable only for the purposes of division of property on dissolution of marriage. Ownership of the service member's pension rights remains unaffected by that service member's relocation within the State of California. Such pension rights will only be deemed quasi-community property if both husband and wife become domiciles of California *and* thereafter one of them institutes a divorce proceeding within the State of California. The new quasi-community property statute survived a constitutional challenge specifically because it was held to become operable only if both preconditions were met: Both spouses become domiciles of California and a divorce is filed here. *Addison v. Addison* (1965) 62 C.2d 558, [399 P.2d 897]; *In re Marriage of Roesch* (1978) 83 C.A.3d 96, 107. Therefore, since the California domicile of both spouses is a prerequisite to the application of § *4803*, its reach can be avoided by a service member who maintains his domicile in another state even though the Army locates him within the State of California. His spouse's domicile alone will not be enough to bring the code section into effect if the divorce is commenced in California. That a service member may retain a domicile at a location other than his duty assignment is a well-established doctrine to-

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[13]*Thornton* held then Civil Code § 164 unconstitutional.

tally overlooked by Husband herein. *Finger v. Masterson* (1957) 152 F.Supp. 224; *Wise v. Bolster* (1940) 31 F.Supp. 856; *Sweeney v. District of Columbia*, 113 F.2d 25, cert. den. 310 U.S. 631.[14]

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[14]Under California law, husband and wife may have different domiciles. Therefore, it is conceivable that a California divorce action could be brought by the service spouse as a California domicile, even though the service member were domiciled in another state. Although the California Court in such a situation would have jurisdiction to dissolve the marriage, § 4803 would not apply in such a case, and the California divorce court would not reach the service member's retirement benefits (or for that matter, any other property) acquired while domiciled outside of California.

In this case, the trial court found and the Court of Appeal affirmed that Husband was a California domiciliary. The Court of Appeal below further held that even if Husband had not been a California domiciliary, by the act of commencing the California action for dissolution of his marriage, Husband submitted himself to the application to him of California laws governing dissolution of marriage. Although Husband herein states that he "found himself" before the California Court, in fact he placed himself before that Court by filing in California and not in Oregon, his claimed State of domicile. Husband's assertion that he was required to file in California in order to seek custody of his children is flatly contradicted by California statute. In view of the fact that all of the children lived and had lived in California for several years, it is clear that California would have jurisdiction over the issues of child custody under the Uniform Child Custody Jurisdiction Act. (*California Civil Code* § 5152 and § 5156.)

However, *California Civil Code* § 4503 specifically states that an action may be brought in California to determine child custody *without* also being an action for dissolution of marriage in California.

B

MILITARY RETIRED PAY

1. *In General.*

Military Retired Pay is an integral and immense part of the overall structure of military pay in general.[15] At the present time, the budget for retired pay is as large as the budget for current salaries for those on active duty in the military.[16]

Statutory provisions provide for both mandatory and voluntary retirements.[17] Provision is also made for three different types of retired pay: reserve, disability, or nondisability.[18] Nondisability retirement pay for retirement from active duty is by far the largest category numerically and is the type of retired pay which is the subject of the appeal herein.[19]

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[15]See generally, House Armed Services Committee Rep. No. 95-85, *Preliminary Review of Military Retirement Systems* Hearings before the Military Compensation Subcommittee of the House Armed Services Committee, 95th Cong., 1st and 2nd Sess. 5 (1977-78) (Statements of Col. Leon S. Hirsch, Jr.) (CIS Index H201-49) [hereinafter cited as H.A.S.C. Rep. No. 95-85]

[16]Fiscal year 1979 Defense Budget Overview: Hearings before the Task Force on National Security and International Affairs of the Committee on the Budget, House of Representatives, 95th Cong., 2nd Sess. 370 (1978) (Statement of Robert L. Leggett, Chairman).

[17]10 U.S.C. §§ 3841-3855 (Separation or Transfer to Retired Reserves); 10 U.S.C. §§ 3911-3929 (Retirement for Length of Service, Army); 10 U.S.C. §§ 3883-3889 (Retirement for Age); 10 U.S.C. §§ 6321-6322 (Voluntary Retirement); also, see generally HASC Rep. No. 95-85, supra, note 15 at 6-7.

[18]See HASC Rep. No. 95-85, supra, note 15.

[19]See HASC Rep. No. 95-85, supra, note 15.

Upon nondisability retirement from active duty, whether voluntary or mandatory, the retiree receives retired pay fixed at a level computed solely by reference to the service member's final rank achieved and the service member's total number of years served on active duty. (10 U.S.C. § 3991) No other factors affect the level of the retired pay, and the retiree is not required to perform any current duties as a prerequisite to the receipt of his retired pay.

The amount of retired pay is generally 50% of the service member's base pay for 20 years' service, and up to 75% of the base pay for 30 years' service.[20] The generous level of retired pay, coupled with the fact that retirement can occur after 20 years of service, without any requirements of minimum age of the retiree, provides a very strong inducement for young military members to remain in the service. Military careers are typically short: In 1977, the average of retirement was 42 years, after 22½ years of service.[21] Thus, military retirees are typically retired with a generous federal pension, while still young enough to commence and enjoy a lengthy and civilian career as well.[22]

In addition to the Army Retired pay system, the service member, like his or her spouse, if employed, contributes to the Social Security Administration and is entitled to ail

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[20]See U.S.C. §§ 1401, 3991, 8911.

[21]See HASC Rep. No. 95-85, supra, note 15.

[22]Surely, Congress is not unaware of the efficacy of such deferred compensation as an inducement to young service members to remain in the service, especially to professionals, such as Dr. McCarty, who might otherwise be drawn to the more lucrative career opportunities in the civilian world. It must be assumed that Congress is aware of the power of financial incentives.

benefits provided by that System, separate and apart from any Army or other military retirements benefits. In this regard, the military family is just like any other family, and the military retirement pay, like civilian retirement plans, provides additional retirement income over and above Social Security.

2. *Viewed Realistically, Military Retired Pay Is Deferred Compensation For Active Duty.*

It has been suggested that because a military retiree remains subject to recall under very limited circumstances of national emergency, that the retiree's retired pay constitutes current payment for current services rendered. The argument fails on several grounds:

(1) No act, service, or duty is required of a military retiree, such as Husband herein, as a prerequisite to his right to receive the retired paycheck each month. Upon completion of the 20 years active duty, the military member's pension or retirement is vested or accrued, and the service member has an enforceable right to the payments upon his retirement. The level of the retired pay itself is based solely upon the rank attained by the service member *prior to retirement,* and on the number of years served on active duty prior to retirement. 10 U.S.C. § 3991. Thus, not only the right itself, but also the criteria which determine the value of the right, derive entirely from pre-retirement factors.

(2) Retired service members do suffer a limited vulnerability to recall in a national emergency. 10 U.S.C. § 3504(a). However, that such vulnerability to recall does not constitute the reason for the payment of retired pay is evident from the fact that millions of servicemen who sep-

arate from the service before they are eligible for retired pay also undergo a period of vulnerability to recall in the event of a national emergency. (See e.g. 10 U.S.C. § 269).

Husband cites the Court of Claims case of *Lemly v. United States,* 75 F.Supp. 248, 249 (Ct.Cl. 1948) for the proposition that retired pay is distinct from a pension because of the aspect of vulnerability to recall. However,

> "In *Lemly,* the court of claims was faced with the question whether a Naval Reserve office who contracted a disabling disease while on active duty was entitled to post-retirement compensation for his service-connected disability. Because the court of claims has jurisdiction over claims for retirement pay, but not claims for pensions, the court distinguished the two types of benefits, and determined that retirement pay is compensation for services presently being performed since the recipient is subject to all times to recall to active duty.
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> Whether retirement pay is a pension and thus excluded from the jurisdiction of the court of claims is far removed from the problem of classifying retirement benefits under state community property law, and is not authoritative on the latter issue. Furthermore, in Gordon v. United States (1956) 140 F.Supp. 263 [134 Ct.Cl. 840], the court of claims reconsidered the nature of retirement pay and concluded that it is awarded to servicemen 'for the reason that it is something they earned while in the service of their country.' " *In re marriage of Fithian, supra,* 10 Cal.3d at 603.

(3) If in fact a retired service member (or for that matter an ex-service member separated before entitlement to retired pay) is recalled to active duty in the event of a

national emergency, he then receives additional compensation according to the active duty pay scale for his active duty services, which compensation unquestionably is current pay for current services rendered. In addition, after such recall to active duty, a service member's rate of retired pay thereafter will be increased because of the additional length of service. 10 U.S.C. § 1402.

The reasoning of the California Supreme Court was sound when it declared,

> ". . . military retirement pay must be realistically viewed as compensation for past, not present, services. Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military, and not to compensate him for his limited responsibility to the government after his retirement. . . . The conclusion is inescapable that retirement pay is awarded in return for services previously rendered. . . ." *In re marriage of Fithian, supra,* 10 Cal.3d at 604.

See also *In re marriage of Miller* (Mont.) 609 P.2d 1185, 1186-7 (1980).

II

WHETHER A SPECIFIC RIGHT OR BENEFIT CONSTITUTES "PROPERTY" IS GOVERNED BY STATE LAW

Throughout the proceedings herein, Husband has asserted that military retired pay does not constitute property. Husband's arguments are not pertinent herein, inasmuch as the determination of what does or doesn't constitute "property" for purposes of application of state laws

regarding property is a state, and not a federal, question. *Beal v. Missouri Pac. RR Corp.*, 312 U.S. 45.[23] It is well established under California law that retirement benefits do constitute property for the purposes of application of the California laws governing division of property on dissolution of marriage, whether such retirement benefits are vested, unvested, contingent, contractual, noncontractual, or otherwise. Certainly the Federal Government has no interest in telling California that it cannot apply its own law to "property" unless such "property" is "contractual" or "vested."[24] The only question before this Court is whether or not California, once having found that retirement benefits do constitute "property" subject to disposition on dissolution of marriage, is precluded from applying such laws to certain specified retirement benefits by the mandates of the Supremacy Clause.

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[23]The United States is in agreement that the question of whether or not Federal retirement benefits can be considered "Property" at all is not a pertinent question. See Solicitor General's Brief for the United States filed in the matter of *Hisquierdo v. Hisquierdo*, No. 77-533, October Term, 1978.

[24]However, even if that were a question for federal determination, the question whether a certain right may be contractual or vested or otherwise, is not determinative of whether that right may be designated "property." Expectancies, although neither vested nor contractual, can constitute property rights. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

III

FEDERAL PRE-EMPTION OF STATE LAW OCCURS ONLY WHERE THERE EXISTS AN ACTUAL CONFLICT BETWEEN THE STATE AND FEDERAL LEGISLATIVE SCHEMES OR AN UNAMBIGUOUS CONGRESSIONAL MANDATE OF PRE-EMPTION AND ACTUAL DAMAGE OR INTERFERENCE WITH FEDERAL INTERESTS

The doctrine of Federal pre-emption of State statutes is one which has historically been sparingly applied when the Federal Legislation in question touches upon a subject matter traditionally occupied by the States. As stated by this Court in *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, where the congressional Legislation in question touches upon an area traditionally occupied by State Legislation,

> ". . . we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the *clear and manifest* purposes of Congress." [Emphasis supplied]

This principle has been reaffirmed by this Court.

> "The settled mandate governing this inquiry, in deference to the fact that a State regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a Federal displacement 'unless that was a clear and manifest purpose of Congress,' [citing *Rice, supra*]. In other words, we are not to conclude that Congress legislated the ouster of this California statute . . . in the absence of an unambiguous Congressional mandate to that effect." *Florida Avocado Grower's v. Paul* (1963) 373 U.S. 132, 146-7.

This principle of caution in the application of the pre-emption doctrine serves to maintain and protect the balance between State and Federal powers which is well-rooted in American Federalism. The importance of maintaining that State-Federal balance has been discussed by this Court in *United States v. Bass* (1971) 404 U.S. 336, 349:[25]

> "In traditionally sensitive areas, such as legislation affecting the Federal balance, the requirement of clear statement assures that the legislature has in fact *faced,* and *intended to bring into issue,* the critical matters involved in the judicial decision." [Emphasis added]

A traditional area of State police powers, protected by the presumption against Federal pre-emption, is the subject of marriage and domestic relations, including marital property laws.

> "Insofar as marriage is within temporal control, the States lay on the guiding hand. 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *In re Burrus* 136 U.S. 586, 593-594, 34 L.Ed. 500, 10 S.Ct. 850. (1890)."
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> *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581.

Such has been the case throughout the history of this nation, with the result that,

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[25]Although *United States v. Bass* discusses the Federal balance in the realm of criminal jurisdiction, the Federal concerns expressed there are equally applicable to the Federal-State balance in the areas of non-criminal legislation. *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.

> "there is no Federal law of domestic relations, which is primarily a matter of State concern." *DeSylva v. Ballentine* (1956) 351 U.S. 570, 580.

This Court has also recognized that the peculiarly local State laws regarding and defining rights and obligations between husbands and wives are typically

> ". . . part of an ingenious, complex, and highly purposeful distribution of property rights between husband and wife, geared to the institution of community property and designed to strike a balance between efficient management of joint property and protection of the separate property of each spouse." *United States v. Yazell* (1966) 382 U.S. 341, 350.

Thus, Federal determination of pre-emption as to one specific matter or item, even though inspired by the desire to protect Federal interests, is likely to cause consequences and repercussions to the parties, through the interaction of the complicated and interdependent State rules surrounding marriage and marital property, which consequences and repercussions the Federal courts are unlikely to foresee. Therefore, it has been stated by this Court,

> "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Yazell, supra*, 382 U.S. at 352.

And more recently,

> "On the rare occasion when state and family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. *Wetmore v. Markoe*, 196 U.S. 68, 77, 49 L.Ed. 390, 25 S.Ct. 172 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' Federal interests before the Supremacy Clause will demand that State law be overridden. [Citing *Yazell, supra.*]" *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581.

Thus, to find pre-emption not only must there be a conflict between the state and federal schemes, but the state scheme must do actual damage to federal aims. The federal government has no interest in nullifying state law which, although conceptually at odds with federal law, does no damage to and does not interfere with federal interests or aims.

IV

CONGRESSIONAL ENACTMENTS REGARDING MILITARY RETIRED PAY DO NOT PRE-EMPT CALIFORNIA COMMUNITY PROPERTY LAWS REGARDING DIVISION OF PROPERTY UPON DISSOLUTION OF MARRIAGE

The most recent delineation by this Court of pre-emption principals in the area of Family Law is, of course, *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). In *Hisquierdo*, while reaffirming the general presumption against pre-

emption discussed above, this Court did find that Congress, in enacting the Railroad Retirement Act, had pre-empted the application of California community property laws to benefits under the Railroad Retirement Act. The pre-emption found in *Hisquierdo* was implied from what this Court saw as extensive Congressional planning in the structure of the Railroad Retirement Act. This Court noted specifically two primary factors in the Railroad Retirement Act Legislation: (1) the inclusion in the Railroad Retirement Act of a limited "community concept", providing a separate payment to a spouse; 439 U.S. 572, at 584 *and* (2) a strong nonattachment and nonanticipa*tion* clause (§ 231M), which this Court identified as the "protector" of Congress' decision to protect the railroad worker's retirement pay from fluctuations of state law by creating the limited "community property" concept. 439 U.S. 572 at 585.

By comparison, the factors which supported a finding of pre-emption with respect to the Railroad Retirement Act are not present in the Congressional scheme governing military retired pay.

A. Military Retired Pay Includes No Provision For A Separate Spousal Payment

The Railroad Retirement Act created a separate entitlement for the spouse of the railroad employee, and then provided specifically that the separate spousal entitlement would cease upon divorce. 45 U.S.C. § 231d(c)(3). In addition, when the Railroad Retirement Act was revised in 1974, Congress specifically considered and rejected a proposal to extend the separate spousal benefit to a divorced

spouse, following the example of the Social Security Act. *Hisquierdo, supra*, 439 U.S. 572 at 585. Thus, from the Act itself and from its legislative history, this Court was able to conclude that Congress had consciously considered and decided the issue of treatment of Railroad Retirement Act benefits upon dissolution of marriage.

Nothing similar can be found anywhere in the statutes governing military retired pay.[26] A retired Army officer does have the option of voluntary participation in the survivor benefit plan, 10 U.S.C. §§ 1447-1455, which allows the retired member to decrease the amount of the retired pay payments received by him each month in order to fund an annuity which will be payable to his children *or* his widow upon his death. These provisions, unlike the separate spousal payment provision of the Railroad Retirement Act, do not create a separate entitlement for a spouse but simply provide an option for the retired member to, in effect, invest part of his entitlement to fund a future annuity to be paid after his death. The inclusion by Congress of provisions for such an annuity, payable after death of the retired member, are totally unrelated to the concept of a separate payment to a spouse while the retired member still lives. An attempt to compare the

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[26]As Husband points out, both the service member and the service member's spouse, if employed, contribute to the Social Security Administration and are eligible for all benefits available pursuant to the Social Security act. However, Social Security benefits are entirely separate and apart from military retired pay and can no more be considered a part of the package of military retired pay than they could be considered a part of the package of a retirement plan from a private employer

two types of provisions will yield only apples on the one hand and oranges on the other.

> "Congress' concern for the welfare of soldiers' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death." *In re marriage of Fithian*, supra, 10 Cal.3d at 600.

The treatment of ex-wives and the treatment of widows do not present analogous problems or considerations. Congress' choice to provide for widows in the case of military retired pay cannot be compared with the Congress' choice to provide for spouses of living retirees in the Railroad Retirement Act.

Compare the provisions of the Social Security Act, which do set up a separate payment for spouses even after a divorce, provided that the marriage was of a certain minimum duration.[27] California Courts have recognized pre-emption by Congress in the Social Security Act, and have held that California is foreclosed from treating or dividing Social Security benefits as community property because of Federal pre-emption of the field. *In re Marriage of Nizenkoff*, 65 C.A.3d 136 [135 Cal.Rptr. 189] (1976).

Compare also, the Federal Civil Service Retirement System (5 U.S.C. §§ 8331-8348). The statutes governing Civil Service pensions, like the statutes governing military retired pay, provide no separate spousal benefit. By amendment in 1978, Congress has specifically allowed at-

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[27]Pub.L. No. 95-216, 91 Stat. 1509 (1977); 42 U.S.C. § 416(d)(1).

tachment of Civil Service pensions for the purpose of satisfying state community property settlements. 5 U.S. Code § 8345(j) (1) (1976 and Supp. II 1978).

B. There Has Been No Congressional Statement Of Anti-Attachment or Anti-Anticipation Of Regard To Military Retired Pay

Assignment, attachment, and anticipation of benefits—though related concepts—are not identical. The distinctions have been noted by this Court in *Hisquierdo* in discussing the uniquely broad reach of § 231M of the Railroad Retirement Act.[28] 439 U.S. 572, 584-586.

Congress has passed a statute governing *assignment* of military pay and military retired pay: 37 U.S.C. § 701(a) and (c).[29]

This section controls the retiree himself, either prohibiting (or, as in Husband's case herein, *allowing*) the retiree to make an assignment. This statute does not address or control third parties, such as creditors. Section 701 is silent as to either attachment or anticipation of benefits.

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[28]45 U.S.C. § 231M, "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

[29]Interestingly enough, although enlisted members may not assign their pay or retired pay, officers, such as Dr. McCarty herein, are allowed to assign their pay and/or retired pay. 37 U.S.C. § 701(a); § 1-17, Army Regulation No. 37-104-1, issued by Headquarters, Department of The Army, Washington, D.C., July 1, 1977.

By comparison, the concepts of attachment and anticipation are not directed solely to the member/retiree, but involve third parties. Congress has never passed either an anti-attachment or an anti-anticipation provision applicable to military pay or military retired pay.

The only concept of non*attach*ability which is applicable to military retired pay derives not from a Congressional statement, but rather from a loose judicial doctrine traceable to *Buchanan v. Alexander*, 45 U.S. (1 How.) 20 (1846), which sets forth the concept that sovereign immunity prevents the garnishment of a sailor's wages by creditors while those wages are still held up by the government. The doctrine of sovereign immunity remains to this day the only source for any concept of nonattachability of military retired pay. Congress has never enacted a statutory prohibition against attachment of military pay or retired pay.

Significantly, this court has suggested that general concepts of sovereign immunity are not sufficient to require pre-emption of state law. Finding pre-emption in *Hisquierdo*, this Court specifically noted that § 231M of the Railroad Retirement Act did not merely "restate the government's sovereign immunity from burdensome garnishment suits. . ." 439 U.S. 572, 585-6, but goes beyond to state that the benefit "shall not be subject to 'any legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.' " 439 U.S. 572, 586.

By comparison, for military pay and military retired pay, Congress has remained silent regarding nonattachability,

and *has* left the matter governed solely by the traditional sovereign immunity doctrine.

The sovereign immunity doctrine derived from *Buchanan v. Alexander, supra,* does *not* include any anti-anticipation provisions of the sort found to be so meaningful by this Court in *Hisquierdo,* and Congress has enacted none with respect to military pay and retired pay.

The specific provisions of § 231M which this court found controlling are conspicuously absent from the statutory scheme created by Congress to govern military retired pay. The "unambiguous mandate" essential to a finding of pre-emption, cannot be found.

C. Congressional Statement That Retirement Benefits Are "Personal Entitlement" Of Member Indicate Only That Benefits Cease Upon Death Of Service Member

It is true, as Husband points out, that Congress has stated that military retired pay is to be considered a "personal entitlement payable to the member himself as long as he lives." Senate Report No. 1480, 90th Cong. 2nd Sess. (1968). However, examination of the quoted statement in context reveals clearly that Congress used the phrase "personal entitlement" simply to signify that the retirement benefits would cease upon the death of the serviceman, and therefore, not be available as a continuing source of support for the serviceman's dependents. Congress refers to military retirement benefits as the "personal entitlement" in the context of underscoring the need for an annuity plan in order to provide for a *deceased* serviceman's family. (1968 U.S. Code Cong. and Admin. News, Page 3300.)

The application of California community property laws to military retired pay does not interfere with this concept of "personal entitlement" inasmuch as the spouse's interest in the member's retired pay, under California law, is a nontestamentary community property right in the benefit extending only during the lifetime of the service member. His entitlement, as well as hers (and/or the community's) ceases upon the service member's death, in accordance with Congressional intention.[30]

V

LEGISLATIVE HISTORY OF RECENT CONGRESSIONAL ENACTMENTS SHOWS THAT CONGRESS HAS NOT MANDATED PRE-EMPTION, BUT RATHER HAS DEFERRED CONSIDERATION OF THE QUESTION

In order to find Congressional pre-emption of a state family law statute, it is essential to find that Congress actually considered—and reached some decision about—the issues involved in the judicial decision. *United States v. Bass, supra,* 404 U.S. 336, at 349.[31] It is from such actual legislative consideration that the "unambiguous Congressional mandate[32] is to be found, if at all.

The Congressional mandate of pre-emption may be express as in those instances where Congress has specifically

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[30]See discussion supra at Page 16-17.

[31]See Footnote 25, supra, and accompanying text.

[32]*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 146-7; *supra.* at Page 24.

stated who it wants to be the sole owner of the right or benefit or entitlement which is under question.[33] For example, in *Free v. Bland* (1962) 369 U.S. 663, Federal pre-emption was found on express Congressional mandate where regulations issued under statutory authority provided, *inter alia*, that "[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations . . ." 369 U.S. at 667, fn. 5, 6. The Congressional mandate, or the conflict between the two legislative schemes, may also be found by implication where the Congressional action regulating the right in question, while falling short of an express declaration of pre-emption, is so complete that it can be inferred that Congress intended to occupy the field. Thus, in *Hisquierdo*, this Court found pre-emption by the Railroad Retirement Act although nowhere in that Act has Congress specifically declared that the retiree and no other person would have any rights to the benefits in question. Notwithstanding the absence of an express declaration of pre-emption, it was found that the enactments that Congress has made, especially the limited spousal provision of 45 U.S.C. § 231d(c)(3) and the uniquely broad language of 45 U.S.C. § 231m, implied Congressional occupation of the field. Also significant in *Hisquierdo* was Congressional history indicating that Congress had specifically considered the extension of the spousal payment to a divorced spouse and rejected that proposal. 439 U.S. 572, at 585.

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[33]See generally, D. Shaver, *Community Property Division of Military Retired Pay: Will the California Supreme Court Retire Milhan?*, 11 Pacific Law Journal 1039, 1045-1050, for discussion of express vs. implied pre-emption.

Thus, it is apparent that a finding of pre-emption requires clear evidence that Congress has considered the specific question before the court. As discussed above, Congress has not enacted any express mandate of pre-emption with respect to military retired pay. In addition, those enactments that Congress has chosen to make are neither pervasive nor unambiguous such as would allow an implication of pre-emption similar to that in *Hisquierdo*. In fact, a review of legislative history of recent Congressional enactments requires the conclusion that Congress simply has not considered the question of whether military retired pay may be divided between husband and wife upon a dissolution of marriage.

It has been suggested that the 1975 and 1977 Amendments to 42 U.S.C. § 659, and 42 U.S.C. § 662(c) imply an intention by Congress that military retired pay be shielded from the application of any state laws. An examination of those Amendments and the legislative history surrounding them requires a conclusion that Congress, in making those amendments, did *not* address the question of divisibility of military retired pay. The 1975 Amendment was passed in order to enable attachment of all federal payments of wages or retirement benefits (including, *inter alia*, Railroad Retirement Act benefits and military retired pay) for the purpose of enforcement of the payee's child support and/or alimony obligations.[34] The 1977 clarifying Amendment ex-

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[34]42 U.S.C. § 659(a) provides, "Notwithstanding any other provision of law, effective January 1, 1975, monies (the entitlement to which is based upon renumeration for employment) due from, or payable by, the United States or the District of Columbia, (including any agency, subdivision, or instrumentality thereof) to

cluded community property settlements (as well as common law equitable distributions of property or other divisions of property between spouses) from the definition of "alimony" for the purposes of § 659.[35] Prior to the Amendments of §§ 659 and 662(c), no attachment was allowed of such government payments. Thus, the purpose of the enactments is not to restrict the operation of state family laws, but to facilitate such state laws.[36] The statutes carve out an exception to the traditional sovereign immunity concept derived from *Buchanan v. Alexander*, supra, 45 U.S. (1 How.) 20 (1846). If, as this Court implied in *Hisquierdo*, the concept of sovereign immunity in and of itself is insufficient to

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any individual, including members of the Armed Services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

[35]42 U.S.C. § 662(c): "The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with state law), includes but is not limited to, separate maintenance, alimony pendente lite, maintenance and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable state law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

[36]See generally S.Rep. No. 93-1356, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code, Cong. & Ad. News at 8157.

support pre-emption (439 U.S. 572, 585-6), it is difficult to imagine how the carving of an exception to the traditional doctrine, for the purpose of assisting the application of local state family laws, indicates an intention of federal pre-emption.

With respect to the 1977 clarifying Amendment to § 662(c), legislative is meager. No Congressional comment or explanation appears for the exclusion of property divisions from the scope of the Amendments, nor does any Congressional comment or legislative history clarify Congress' intentions as to the extent to which federal benefits may be affected by state family laws. *Hisquierdo*, supra, 439 U.S. at 587, fn. 20.

In connection with earlier legislation, Congress did discuss the question of attachment of military retired pay, and deferred any action in that regard in the hope that a uniform attachment provision for all federal entitlements would be passed instead.[37]

Following the 1975 and 1977 Amendments to § 659 and § 662(c), Congress did act specifically to make Civil Service pensions attachable in order to satisfy state community property settlements.[38] There is no indication in the Congressional Record that Congress discussed the question of military retired pay during consideration of the Civil Ser-

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[37]H.Rep. No. 92-481, 92nd Cong. 1st Sess., at 24 (1974).

[38]5 U.S.C. § 8345(j) (1) (1976 & Supp. II 1978). See generally S.Rep. No. 95-1084, 95th Cong., 2nd Sess.; 1978 U.S. Code Cong. & Ad. News 1379. See also 5 U.S.C. § 8346.

vice pension Amendment.[39] Coupled with Congress' earlier deferral of consideration of the question of military retired pay vis a vis community property divisions, Congress' continued silence with respect to military retired pay compels a conclusion that Congress is still deferring the question. In fact, as recently as May 28, 1980, it was the position of the Department of Defense that consideration of the issue again be deferred by Congress pending completion of a report by the President's Commission on Pension Policies, which Commission is in the process of studying federal pension and retirement programs and the question of the status of divorced spouses under such programs, with the apparent aim of eventual comprehensive Congressional action.[40]

The absence of any clear Congressional statement regarding the issue of whether the military pensions may be divided by a state court upon dissolution of marriage, taken together with the legislative history surrounding recent federal enactments governing various federal payments, indicate that Congress has never squarely discussed, addressed, or determined this issue. In the absence of an actual clear Congressional consideration of the issue, it is improper to imply a Congressional attempt to pre-empt

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[39]See generally S.Rep. No. 94-1350, 94th Cong., 2nd Sess. (1976) (CIS Index S363-40); 123 Cong. Rec. § 6722-S6728-S6772-S6773 (April 29, 1977).

[40]Summary statement of Major General R. Dean Tice, U.S.A. Deputy Assistant Secretary of Defense (Military Personnel Policy, before the Subcommittee on Compensation, Committee on Armed Forces, House of Representatives, on H.R. 2817, H.R. 3677, and H.R. 6270, May 28, 1980. Said Summary statement is set forth in full in the Appendix hereto.

state family law. Until such time as Congress does choose to fully address and discuss this admittedly complex issue, it is not for this Court to say that Congress intends pre-emption. Pre-emption appears only from Congressional statement, and not from Congressional failure to speak. The task of discovering Congressional intent is difficult enough when examining what Congress has done and said. When the examination addresses what Congress has not done or not said, it approaches divination.

VI

APPLICATION OF COMMUNITY PROPERTY LAW TO MILITARY RETIREMENT PAY DOES NOT DAMAGE OR INTERFERE WITH FEDERAL INTEREST; AND POLICY CONSIDERATIONS REQUIRE THAT NO PRE-EMPTION BE FOUND

As discussed above, the Congressional enactments establishing and regulating a system of military retired pay had not created a conflict with state community property laws. However, even if such a conflict did exist, as discussed above, a mere conflict is insufficient to require pre-emption. There is an additional requirement that a "state family and family property must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo, supra,* 439 U.S. at 581.

The clear and substantial federal interest herein is the interest in attracting and retaining personnel for military forces. That clear and substantial federal interest will not be impaired by allowing states to apply their com-

munity property laws to military retired benefits upon dissolution of the marriage of a military member or retiree.[41]

Congress has an interest in inducing young individuals to join and remain in military service for a significant period of time. In the creation of a system of military retired pay, Congress has created a rational and successful inducement.[42]

Military personnel, like civilians, ordinarily marry and have families. The nature of a military career demands both of the service member and of the service member's families certain sacrifices that a civilian career might not.

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[41]For that matter, neither is this clear and substantial federal interest compared by allowing non-community property states to apply their laws of marital property to military retirement interests.

[42]Certainly, Congress is not ignorant of the powers of financial incentives. The power of the inducement of the military retired pay system is especially apparent in the attraction to military service of that caliber of individual who typically becomes an officer: Talented, well-qualified, and well-educated individual; i.e., a professional such as Husband herein. Such individuals are those who are most likely to have the opportunity of lucrative careers in the civilian world. Certainly, the current military policy of generous deferred compensation in the form of military retired pay was intended to and does have a rule in inducing, for example, a young doctor to remain in military service for 20 years, foregoing for that period of time the career potentials of the civilian sector. For example, when the parties herein separated, Husband, after 18 years as a medical doctor, received a total monthly compensation of $2,596.51. It is not unreasonable to assume that Husband's knowledge that he would be eligible to retire with a full military pension at the age of 43 affected his and his families' decision to remain in the military.

For example, military families are frequently relocated. The children change schools. The spouse's career or employment is disrupted. For some, such as professionals, the salary may typically be lower than what that individual would earn in his civilian career. In many senses, not only the service member but the service member's entire family is in the military during the course of the service member's career.

If a state property law system, such as California's community property law, views a marriage as a partnership of Husband and Wife and considers the acquisitions of either to have been the result of that partnership, no federal interest is impaired by allowing that state to apply its laws to military as well as civilian personnel, to the extent such individuals may be properly within that state's jurisdiction. Such a result no more decreases the morale of the service member than an opposite result would decrease the morale of the service member's spouse, and thus, presumably the morale of the service member. There is no federal interest in creating disharmony between a military service member and spouse. There is no federal interest in creating a double standard such that two spouses standing before the same state divorce court will receive vastly different treatment simply because one chose to marry a civilian and one chose to marry a military man. There is no federal interest in creating a disincentive against marrying a military person. Certainly, if the morale of the military is a valid concern of Congress, it can be expected that Congress has an interest in military persons having normal family lives just as civilians do. Requiring that a military

person be subject to the same duties and obligations of marriage as a civilian does not harm the national security of this Nation.

Respectfully submitted,
LAW OFFICES OF WALTER T. WINTER

By WALTER T. WINTER
BARBARA R. DORNAN
Counsel for Appellee

(Appendix follows)

APPENDIX

5 U.S.C. § 8346a

§ 8346.

(a) The money mentioned by this subchapter is not assignable, either in law or equity, except under the provisions of subsections (h) and (j) of section 8345 of this title, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws.

10 U.S.C. § 1402

§ 1402. Recomputation of retired or retainer pay to reflect later active duty

(a) A member of an armed force who has become entitled to retired pay or retainer pay, and who thereafter serves on active duty (other than for training), is entitled to recompute his retired pay or retainer pay upon his release from that duty as follows:

Col. 1, take—	Col. 2, multiply by—	Col. 3, subtract—
Monthly basic pay[1] of the grade in which he would be eligible— (1) to retire if he were retiring upon that release from active duty; or (2) to transfer to the Fleet Reserve or Fleet Marine Corps Reserve if he were transferring to either upon that release from active duty.	2½ percent of the sum of— (1) the years of service that may be credited to him in computing retired pay or retainer pay; and (2) his years of active service after becoming entitled to retired pay or retainer pay.[2]	Excess over 75 percent of pay upon which computation is based.

[1]For a member who has been entitled, for a continuous period of at least two years, to basic pay under the rates of basic pay in effect upon that release from active duty, compute under those rates. For a member who has been entitled to basic pay for a continuous

(Footnotes continued on following page)

However, an officer who was ordered to active duty (other than for training) in the grade that he holds on the retired list under former section 6150 of this title, or under any other law that authorized advancement on the retired list based upon a special commendation for the performance of duty in actual combat, may have his retired pay recomputed under this subsection on the basis of the rate of basic pay applicable to that grade upon his release from that active duty only if he has been entitled, for a continuous period of at least three years, to basic pay at that rate. If, upon his release from that active duty, he has been entitled to the basic pay of that grade for a continuous period of at least three years, but he does not qualify under the preceding sentence, he may have his retired pay recomputed under this subsection on the basis of the rate of basic pay prescribed for that grade by the rates of basic pay replaced by those in effect upon his release from that duty.

(b) A member of an armed force who has been retired other than for physical disability, and who while on active duty incurs a physical disability of at least 30 percent for which he would otherwise be eligible for retired pay under chapter 61 of this title, is entitled, upon his release from active duty, to retired pay under subsection (d).

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period of at least two years upon that release from active duty, but who is not covered by the preceding sentence, compute under the rates of basic pay replaced by those in effect upon that release from active duty. For any other member, compute under the rates of basic pay under which the member's retired pay or retainer pay was computed when he entered on that active duty.

[2]Before applying the percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

(c) A member of an armed force who—

(1) was retired for physical disability under section 1201 or 1204 of this title or any other law or whose name is on the temporary disability retired list;

(2) incurs, while on active duty after retirement or after his name was placed on that list, a physical disability that is in addition to or that aggravates the physical disability for which he was retired or for which his name was placed on the temporary disability retired list; and

(3) is qualified under section 1201, 1202, 1204, or 1205 of this title;

is entitled, upon his release from active duty, to retired pay under subsection (d).

(d) A member of an armed force covered by subsection (b) or (c) may elect to receive either (1) the retired pay to which he became entitled when he retired, increased by any applicable adjustments in that pay under section 1041a of this title after he initially became entitled to that pay, or (2) retired pay computed as follows:

Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
Highest monthly basic pay that member received while on active duty after retirement or after date when his name was placed on temporary disability retired list, as the case may be.	As member elects— (1) 2½% of years of service credited under section 1208 of this title;[1] or (2) the highest percentage of disability attained while on active duty after retirement or after the date when his name was placed on temporary disability retired list, as the case may be.[1]	Add amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based, if member is on temporary disability retired list.	Excess over 75% of pay upon which computation is based.

[1]Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

If, while on active duty after retirement or after his name was placed on the temporary disability retired list, a member covered by this subsection was promoted to a higher grade in which he served satisfactorily, as determined by the Secretary concerned, he is entitled to retired pay based on the monthly basic pay to which he would be entitled if he were on active duty in that higher grade.

(e) Notwithstanding subsection (a), a member covered by that subsection may elect, upon his release from active duty, to have his retired pay or retainer pay—

(1) computed according to the formula set forth in subsection (a) but using the rate of basic pay under which his retired pay or retainer pay was computed when he entered on active duty; and

(2) increased by any applicable adjustments in that pay under section 1401a of this title after he initially became entitled to that pay.

CHAPTER 371.—COMPUTATION OF RETIRED PAY

§ 3991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401

of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
A	3883 3884 3885 3886 3913 3915 3916 3919 3921 3922 3923	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 3888 or 3927(b), whichever is applicable.[4]	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
B	3911 3918 3920 3924	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 1405 of this title.[4]		Excess over 75% of pay upon which computation is based.
C	3914	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]	10% of product of columns 1 and 2 for extraordinary heroism in line of duty.[5]	Excess over 75% of pay upon which computation is based.
D	3917	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]		Excess over 75% of pay upon which computation is based.

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[1]For the purpose of this section, determine member's retired grade as if section 3962(c) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

[2]Compute at rates applicable on date of retirement.

[3]Compute at rates applicable on date of retirement, or if the member has served as sergeant major of the Army, compute at the high-

(Footnotes continued on following page)

§ 4800. (a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

§ 4803. As used in this part, "quasi-community property" means all real or personal property, whereever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

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est basic pay applicable to him while he so served, if such basic pay is greater.

[4]Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[5]The Secretary of the Army's determination as to extraordinary heroism is conclusive for all purposes.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

§ 4603. Without filing a petition pursuant to Section 4503, husband or wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education and control of the children of the marriage as may be just and in accordance with the natural rights of the parents and the best interests of the children. Such order or decree may be modified or revoked at any time thereafter as the natural rights of the parties and the best interests of the children may require.

§ 4509. In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue.

§ 4801. (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(1) The earning capacity and needs of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties.

(2) The needs of each party.

(3) The obligations and assets, including the separate property, of each.

(4) The duration of the marriage.

(5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.

(6) The time required for the supported spouse to acquire appropriate education, training, and employment.

(7) The age and health of the parties.

(8) The standard of living of the parties.

(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have occurred prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may

be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

§ 5110. Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal repre-

sentatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or a assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyance, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

§ 5125. (a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children

which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

§ 5152. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

(b) It is in the interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.

(d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subdivision (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

§ 5156.(1) A court which has jurisdiction under this title to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state.

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

(d) If the parties have agreed on another forum which is no less appropriate.

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 5150.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any

other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this title if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

SUMMARY STATEMENT
OF
MAJOR GENERAL R. DEAN TICE, USA
DEPUTY ASSISTANT SECRETARY OF DEFENSE
(MILITARY PERSONNEL POLICY)
BEFORE THE
SUBCOMMITTEE ON COMPENSATION
COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ON
H. R. 2817, H. R. 3677 AND H. R. 6270

MAY 28, 1980

Mr. Chairman and Members of the Committee:

I am Major General R. Dean Tice, the Deputy Assistant Secretary of Defense for Military Personnel Policy. Today, Colonel Aaron G. Dorough, the Director of Compensation and Mr. William R. Amis, the Assistant Director of Compensation, are accompanying me. If you have no objection, Mr. Chairman, I would like to submit my prepared statement for the record and summarize the major points for the Committee.

The subject being addressed in the three bills under consideration today involves the treatment of military retired pay during divorce. I realize this is a subject that lends itself to emotional considerations, personal viewpoints, and differing conclusions. Because of this, we have attempted to address the bills against some objective goals. First, we believe that any legislation should not place the government in a position of liability resulting from a divorce decree. Second, we believe that the decisions of a

state court should not be binding on the Federal Government with regard to individual rights. Also we believe it is important that the fact of military service should not be relevant in determining the rights between spouses. Obviously we believe that any legislation should be enforceable without administrative burden.

The divorce courts often consider military retired pay as an item of income or as community property, depending on the State laws, in the financial settlements of a divorce action. Military members, both active and retired, are subject to the rulings of the State divorce courts since the States exercise powers in domestic relations matters. Failure to comply with those decrees places members in violation of State law and subject to legal process. It has long been the Department's view that members are obligated by the terms of a divorce decree and are legally required to meet the financial settlements set out by the State domestic relations courts.

The entitlement of individuals under retirement or pension plans is of concern to the Administration. Recognizing that comprehensive national guidelines are needed, the President's Commission on Pension Policy was established, and legislation was enacted to complement the Commission's efforts. They are in the process of studying the Nation's pension and retirement programs and will be making their recommendations on appropriate measures that should be taken. It is our understanding that one area under study is the status of divorced spouses under pension programs, and that the issue will be included in their recommendations. When the Commission was being established, the President asked for a moratorium on piecemeal

liberalization in pension programs, except where essential. Consequently, we suggest that the Committee may wish to defer action on the pending legislation until we have the benefit of the Commission's study and recommendations.

A divorced spouse is not entitled to a portion of a member's retired or retainer pay. That compensation is paid as a result of performing military duty, or as recompense for the physical inability to perform the duties of military service resulting from injury or disease. However, in instances of divorce, there is an entitlement for a divorced spouse under the social security system. Since 1957, military service has been covered employment, and members are full participants, as are other wage earners. Under that system, benefits are provided for a divorced wife, a surviving divorced wife, and a surviving divorced mother. Entitlement, and the resulting benefits, are based on the wage earners covered employment which determines the Primary Insurance Amount and the benefit level. Because of the military participation in social security, unlike other major federal personnel systems, the divorced spouse of a military member does have entitlement status for social security benefits which other divorcees of federal employees may not have.

Against this background, I would like to discuss briefly the three bills under consideration.

H. R. 2817 would establish an entitlement status not specifically related to the performance of military duties. A divorced spouse of a member would be independently entitled to a portion of military retired or retainer pay by virtue of marriage. Additionally, entitlement would be

extended to a portion of the Survivor Benefit Plan annuity. As proposed, the bill does not incorporate amendments made in the Survivor Benefit Plan by the enactment of Public Law 95-397. Also, the bill appears to establish a perpetual annuity entitlement notwithstanding whether a remarriage occurs before or after age 60. The integration of SBP annuities with Dependency and Indemnity Compensation payments also is interrupted. Although social security integration is preserved, the bill does not include the exemption feature enacted as a feature of Public Law 95-397. Because of the integration offset feature in the SBP, it is possible that neither a spouse or former spouse would receive any of the SBP annuity since the offset would be applied against the divided annuity. Enforcement of this legislation would be extremely difficult. We would be required to establish new administrative, accounting, and pay systems to identify, validate and execute payments. Such systems would be subject to multiple variables, such as remarriage status, age, address changes, VA entitlement status, social security entitlement status, and interpretations of State laws. With these considerations in mind, and the fact that the President's Commission on Pension Policy is addressing the status of divorced spouses, the Department of Defense does not believe that the bill should be favorably considered at this time.

H. R. 3677 and H. R. 6270, unlike H. R. 2817, does not establish an entitlement status. Its provisions are similar to the features of Public Law 95-366. Under these bills, the Secretary concerned would be authorized to comply with the terms of a court determination terminating a domestic relation. The provisions apply to members of the armed

forces, rather than members of all the uniformed services. Additionally, H. R. 6270 provides certain operating procedures and requires the issuance of implementing regulations.

Mr. Chairman, we have no objection with these bills, however, we do have some technical problems with the legislative language. We would be glad to work with your staff to resolve these concerns. Our concerns are on the dissimilar treatment of retired or retainer pay depending upon the form of financial determinations made by the courts—garnishment for alimony and child support vs. financial settlements in a divorce decree. Another concern involves amounts of retired pay waived for the award of VA disability compensation. Our final concern centers around the lack of authority to establish uniform procedures for the execution of payments under H. R. 3677 since other laws require other deductions or limits the amount of pay subject to process. My statement for the record elaborates on these concerns. Although we have objection to H. R. 3677 and H. R. 6270, we believe that H. R. 6270 is more complete assuming the limitations and exclusions set out in other law and other statutes apply.

Mr. Chairman that concludes my summary, and I would be glad to answer your questions.